

Update: Michigan Circuit Court Benchbook

CHAPTER 2

Evidence

Part I—General Matters (MRE Articles I, II, III, V, and XI)

2.9 Limits on Evidence and Testimony

B. Limiting the Length of Questioning

Effective January 1, 2006, MCR 6.414 was amended. On page 35, replace the second sentence with the following text:

Trial courts have the discretion to limit voir dire, MCR 2.511(C) and MCR 6.412(C); MCR 2.507(F) and MCR 6.414(C) and (G) permit a trial court to impose reasonable time limits on opening statements and closing arguments; and trial courts apparently may exercise reasonable discretion over the length of witness interrogation.

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

A. Rule

Effective January 1, 2006, 2005 PA 135 enacted MCL 768.27a. Insert the following text immediately before subsection (B) on page 51:

MCL 768.27a governs the admissibility of evidence of sexual offenses against minors. It applies only to criminal cases. MCL 768.27a(1) states in part:

“Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.”

“Listed offenses” are contained in MCL 28.722. MCL 768.27a(2)(a).

CHAPTER 2

Evidence

Part II—Relevancy (MRE Article IV)

2.14 Similar Acts Evidence

E. Notice Requirement

Effective January 1, 2006, 2005 PA 135 enacted MCL 768.27a. Insert the following text immediately before subsection (F) on page 54:

MCL 768.27a, which governs the admissibility of evidence of sexual offenses against minors in criminal cases, also contains a notice requirement. MCL 768.27a(1) requires the prosecuting attorney to disclose evidence admissible under that statute to the defendant “at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.”

CHAPTER 2

Evidence

Part III—Witnesses, Opinions, and Expert Testimony (MRE Articles VI and VII)

2.31 Self-Incrimination

B. Assertion of Privilege

On page 83, eliminate the October 2005 update to Section 2.31(B). On December 1, 2005, the ruling in *Davis v Straub*, 421 F3d 365 (CA 6, 2005) was vacated. *Davis v Straub*, ___ F3d ___, ___ (CA 6, 2005).

CHAPTER 2

Evidence

Part IV—Hearsay (MRE Article VIII)

2.40 Hearsay Exceptions

I. Declarant Unavailable—MRE 804, MCL 768.26

Insert the following text after the May 2005 update to page 112:

See also *People v Bauder*, ___ Mich App ___, ___ (2005), affirming that the use of a murder victim's non-testimonial statements did not violate defendant's Confrontation Clause rights. Concurring with *United States v Garcia-Meza*, 403 F3d 364 (CA 6, 2005), the *Bauder* Court determined that defendant's admission that he killed the victim resulted in the forfeiture of his constitutional right to confront the victim.

CHAPTER 3

Civil Proceedings

Part II—Pretrial Motions (MCR Subchapters 2.100 and 2.200)

3.15 Motions

F. Decision

Effective January 1, 2006, MCR 8.107 was amended. On page 156, replace the final paragraph with the following text:

A decision should be rendered no later than 35 days after submission. MCR 8.107(A). Matters not decided within 56 days of submission must be identified on the quarterly “Report as to Matters Undecided.” MCR 8.107(B).

CHAPTER 3

Civil Proceedings

Part IV—Resolution Without Trial (MCR Subchapter 2.400)

3.32 Offer of Judgment

C. Amount

On the top of page 198, after the first sentence, insert the following text:

While the value of property may be variable, MCR 2.405(A)(1) is applicable to issues involving property if the offer is for a “sum certain.” *Knue v Smith*, ___ Mich App ___, ___ (2005).

D. Timing

On page 198, replace the first sentence of the paragraph with:

An offer of judgment can be made no less than 28 days before trial. MCR 2.405(B). *Knue v Smith*, ___ Mich App ___, ___ (2005).

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

E. Voir Dire

Effective January 1, 2006, MCR 2.511 was amended. On page 213, replace the second paragraph with the following text:

MCR 2.511(G) provides:

“Replacement of Challenged Jurors. After the jurors have been seated in the jurors’ box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors.”

MCR 2.511(F) prohibits discrimination in the jury selection process. That rule states:

“(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.

“(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.”

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.38 Jury Selection

F. Challenge for Cause

On page 214, before the first full paragraph, insert the following text:

Note: Subsequent to the ruling in *Froede v Holland Ladder Co*, 207 Mich App 127 (1994), 2002 PA 739 amended MCL 600.1307a to require that a person “[n]ot have been convicted of a felony” to qualify as a juror. Effective January 1, 2006, MCR 2.511(D) was amended to eliminate having been convicted of a felony as a basis to challenge for cause the seating of a prospective juror.

CHAPTER 3

Civil Proceedings

Part V—Trial (MCR Subchapter 2.500)

3.39 Voir Dire

A. Generally

Effective January 1, 2006, MCR 2.511 was amended. On page 217, replace the fourth paragraph with the following text:

MCR 2.511(G) provides:

“Replacement of Challenged Jurors. After the jurors have been seated in the jurors’ box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors.”

MCR 2.511(F) prohibits discrimination in the jury selection process. That rule states:

“(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.

“(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.”

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.3 Pretrial Release

D. Conditional Release

MCR 6.106(D)(2) was amended, effective January 1, 2006. Add the following new sub-subsection (m) to the quoted rule at the top of page 274 and reletter the remaining paragraphs accordingly:

“(m) comply with any condition limiting or prohibiting contact with any other named person or persons. If an order under this paragraph limiting or prohibiting contact with any other named person or persons is in conflict with another court order, the most restrictive provision of each order shall take precedence over the other court order until the conflict is resolved.” MCR 6.106(D)(2)(m).

E. Money Bail

The money bail and bond requirements in MCR 6.106(E) were amended, effective January 1, 2006. On page 274, replace the second sentence in the first paragraph with the following text:

MCR 6.106(E)(1)(a) states:

“(1) The court may require the defendant to

“(a) post, at the defendant’s option,

“(i) a surety bond that is executed by a surety approved by the court in an amount equal to 1/4 of the full bail amount, or

“(ii) bail that is executed by the defendant, or by another who is not a surety approved by the court, and secured by

“[A] a cash deposit, or its equivalent, for the full bail amount, or

“[B] a cash deposit of 10 percent of the full bail amount, or, with the court’s consent,

“[C] designated real property[.]”

Replace the second sentence in the second paragraph on page 274 with the following text:

Under this subrule, the defendant cannot post a surety bond in an amount equal to 1/4 of the full bail amount (must be equal to the full bail amount), nor can the defendant post a cash deposit of 10% of the bond amount (must be a cash deposit, or its equivalent, equal to the full bail amount).*

*MCR
6.106(E)(1)(b),
as amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.3 Pretrial Release

H. Custody Hearing

MCR 6.106(G)(1) was amended, effective January 1, 2006, to permit the prosecutor to request a custody hearing. On page 276, replace the third sentence in the paragraph with the following language:

The court may conduct a custody hearing if the defendant is being held in custody pursuant to MCR 6.106(B) and either the defendant or the prosecutor requests a custody hearing.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.5 Attorneys—Waiver of Counsel

C. Advice at Subsequent Proceedings

MCR 6.005 was amended, effective January 1, 2006. Add the following language to the last paragraph on page 284:

If the prosecution would be significantly prejudiced by an adjournment and a defendant has not been reasonably diligent in seeking counsel, the court may refuse to grant an adjournment to appoint counsel or to permit the defendant to retain counsel. MCR 6.005(E).

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.7 Preliminary Examination—Motion to Quash

B. Initial Bind Over by District Court

At the top of page 289, replace the first sentence in the first paragraph with the following language:

Where the law permits a preliminary examination, it must be held within 14 days of arraignment unless adjourned for good cause. MCL 766.4; MCL 766.7; MCR 6.104(E)(4); MCR 6.110(A), (B).^{*} If the parties consent to the adjournment, the court may adjourn the preliminary examination for a reasonable time, for good cause shown. MCR 6.110(B), as amended. If a party objects to an adjournment, the court must make a finding on the record of good cause shown before the court may adjourn the preliminary examination. MCR 6.110(B), as amended. Any violation of the requirements in subrule (B) is harmless error unless the defendant shows actual prejudice as a result of the violation. MCR 6.110(B), as amended.

In the third paragraph on page 289, eliminate the asterisk after the first sentence and its corresponding side note.

^{*}MCR 6.110(A), as amended, effective January 1, 2006.

CHAPTER 4

Criminal Proceedings

Part I—Preliminary Proceedings (MCR Subchapters 6.000 and 6.100)

4.8 Information

C. Joinder of Counts

1. Single Defendant

Effective January 1, 2006, MCR 6.120 was amended and significantly reorganized. On page 292, beginning with the second paragraph, replace the text in this sub-subsection with the following text:

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party’s motion, or the stipulation of all parties—may join against a single defendant offenses charged in more than one information or indictment. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party’s motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) “when appropriate to promote fairness to the parties and a fair determination of the defendant’s guilt or innocence of each offense.” MCR 6.120(B). MCR 6.120(B) further states:

“(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

“(a) the same conduct or transaction, or

“(b) a series of connected acts, or

“(c) a series of acts constituting parts of a single scheme or plan.

“(2) Other relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties’ readiness for trial.

“(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

On a defendant’s motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.9 Motions

F. Disposition

Effective January 1, 2006, MCR 8.107 was amended. On page 295, replace the third paragraph with the following text:

Judges and judicial officers should promptly determine matters submitted to them. Specifically, MCR 8.107(A) states:

“Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and for production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission. For the purpose of this rule, the time of submission is the time the last argument or presentation in the matter was made, or the expiration of the time allowed for filing the last brief or production of transcripts, as the case may be.” MCR 8.107(A).

Matters not decided within 56 days of submission must be identified on the quarterly “Report as to Matters Undecided.” MCR 8.107(B).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.18 Separate or Joint Trial

A. One Defendant—Multiple Charges

Effective January 1, 2006, MCR 6.120 was amended and significantly reorganized. Beginning near the bottom of page 323 and continuing to page 324, replace the entire text in this subsection with the following text:

A defendant may be charged with two or more offenses in a single information or indictment filed by the prosecuting attorney. MCR 6.120(A). However, each offense with which a defendant is charged must be stated in a separate count. *Id.* When two or more informations or indictments are filed against a single defendant, they may be consolidated for a single trial. *Id.*

Except where a defendant is entitled to the severance of unrelated charges, the court—on its own initiative, a party’s motion, or the stipulation of all parties—may join against a single defendant offenses charged in more than one information or indictment. MCR 6.120(B).

Similarly, except where a defendant is entitled to severance, the court—on its own initiative, a party’s motion, or the stipulation of all parties—may sever offenses charged in a single information or indictment against a single defendant. MCR 6.120(B).

A court may join or sever charges under MCR 6.120(B) “when appropriate to promote fairness to the parties and a fair determination of the defendant’s guilt or innocence of each offense.” MCR 6.120(B). MCR 6.120(B) further states:

“(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

“(a) the same conduct or transaction, or

“(b) a series of connected acts, or

“(c) a series of acts constituting parts of a single scheme or plan.

“(2) Other relevant factors include the timeliness of the motion, the drain on the parties’ resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties’ readiness for trial.

“(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

On a defendant’s motion, unrelated charges against that defendant must be severed for separate trials. MCR 6.120(C).

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

A. Right to a Speedy Trial

After the second sentence in the first paragraph on page 326, insert the following text:

“Whenever the defendant’s constitutional right to a speedy trial is violated, the defendant is entitled to dismissal of the charge with prejudice.” MCR 6.004(A).*

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

B. Recognizance Release

Replace the quoted text following the first paragraph on page 328 with the following:

*As amended,
effective
January 1,
2006.

“In a felony case in which the defendant has been incarcerated for a period of 180 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, or in a misdemeanor case in which the defendant has been incarcerated for a period of 28 days or more to answer for the same crime or a crime based on the same conduct or arising from the same criminal episode, the defendant must be released on personal recognizance, unless the court finds by clear and convincing evidence that the defendant is likely either to fail to appear for future proceedings or to present a danger to any other person or the community.” MCR 6.004(C).*

In the introductory sentence after the above paragraph and before the remaining text on page 328, replace “6-month period” with “180-day period.”

C. Untried Charges Against State Prisoners—180-Day Rule

MCR 6.004(D) was amended, effective January 1, 2006. Replace the quoted statutory text of MCR 6.004(D)(1)(a)–(b) on page 329 with the following text:

“the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint. The request shall be accompanied by a statement setting forth the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time or disciplinary credits earned, the time of

parole eligibility of the prisoner, and any decisions of the parole board relating to the prisoner. The written notice and statement shall be delivered by certified mail.” MCR 6.004(D)(1).

Replace the quoted text of MCR 6.004(D)(2), which begins just below the middle of page 329, with the following text:

“(2) Remedy. In the event that action is not commenced on the matter for which request for disposition was made as required in subsection (1), no court of this state shall any longer have jurisdiction thereof, nor shall the untried warrant, indictment, information, or complaint be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.” MCR 6.004(D)(2).

Add the following **Note** before the last paragraph at the bottom of page 329:

Note: The following cases were decided prior to the January 1, 2006, amendment of MCR 6.004(D). Thus, their continued viability must be evaluated in light of the 2006 amendment. In particular, trial courts should evaluate the continued viability of *People v Roscoe*, 162 Mich App 710 (1986), *People v Hill*, 402 Mich 272 (1978), and *People v Hendershot*, 357 Mich 300 (1959), and its progeny.

CHAPTER 4

Criminal Proceedings

Part II—Pretrial Motions and Proceedings (MCR Subchapters 6.000 and 6.100)

4.19 Speedy Trial

D. Detainers

Insert the following text after the second paragraph on page 331:

However, the 120-day time limit may be tolled when the delay was caused by defense counsel's motion to withdraw from representing a defendant due to a conflict of interest. *People v Stone*, ___ Mich App ___, ___ (2005). In *Stone*, the trial court properly excluded the 13-day period from the IAD's time limit calculations because defense counsel's withdrawal on the basis of a conflict of interest is an act "typically [done] for the benefit of the defendant." *Stone, supra* at ___. Where a delay results from action taken to accommodate the defendant's interests, the period of delay is properly excluded from the IAD's 120-day limit. *Stone, supra* at ___.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

A. Generally

Effective January 1, 2006, MCR 6.201 was amended. In the fourth paragraph on page 361, delete the asterisk and its corresponding side note.

The Michigan Supreme Court did not adopt the proposed amendments to MCR 6.610 concerning discovery in criminal matters over which the district court has jurisdiction. On page 362, delete the last sentence in the paragraph before subsection (B), the asterisk, and its corresponding side note.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.26 Discovery

D. Violation of Discovery Order

Before the first paragraph at the top of page 365, insert the following text:

MCR 6.201(B)(1)–(5) requires the prosecutor, at the defendant’s request, to provide the defendant with specific information possessed by the prosecution. The subrule applicable to discovery violations provides:

“(J) Violation. If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. Parties are encouraged to bring questions of noncompliance before the court at the earliest opportunity. Wilful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court. An order of the court under this section is reviewable only for abuse of discretion.” MCR 6.201(J).*

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

B. Witness List

Insert the following language after the second sentence in the paragraph on page 381:

The applicable court rule permits a party to amend its witness list without leave of the court up to 28 days before trial. MCR 6.201(A)(1).*

*As amended,
effective
January 1,
2006.

Insert the following text after the paragraph on page 381:

MCR 6.201(A)(1) requires a party to provide all other parties with the names and addresses of all witnesses the party may call at trial. “[I]n the alternative, a party may provide the name of the witness and make the witness available to the other party for interview[.]” *Id.**

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part III—Discovery and Required Notices (MCR Subchapter 6.200)

4.30 Witnesses—Disclosure and Production

F. Unavailable Witnesses

Insert the following text after the first paragraph on page 383:

Under the equitable doctrine of forfeiture, a defendant forfeits his or her constitutional claims regarding the admissibility of statements made by an unavailable witness when the witness' unavailability resulted from the defendant's wrongdoing. *People v Bauder*, ___ Mich App ___, ___ (2005).

Note: For detailed information on testimonial evidence, a defendant's right to confrontation, and hearsay exceptions applicable to unavailable witnesses, see Section 2.40(I) on page 112 and the corresponding updates to page 112.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

B. Plea Requirements

1. An Understanding Plea

Effective January 1, 2006, MCR 6.302 was further amended, and the provisions in MCR 6.302(B) were reorganized. Replace the August 2005 update to page 385 with the following:

The court may, orally or in writing, advise one or more defendants at the same time of the guilty plea rights in MCR 6.302(B)(3) and (B)(5). MCR 6.302(B). The court may not use a writing to advise a defendant of the guilty plea rights found in MCR 6.302(B)(1), (B)(2), or (B)(4). MCR 6.302(B). If a writing is used to advise a defendant of the rights listed in MCR 6.302(B)(3) and (B)(5), the information must appear on a form approved by the State Court Administrative Office. MCR 6.302(B). If a writing is used to advise the defendant of the rights listed in MCR 6.302(B)(3) and (B)(5), “the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.” MCR 6.302(B).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.31 Felony Plea Proceedings

D. Remedy for a Defective Plea

Effective January 1, 2006, MCR 6.311 was deleted and its provisions were incorporated into MCR 6.310. In the second sentence of the first paragraph on page 386, delete the citation to MCR 6.311.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.33 Plea of Not Guilty by Reason of Insanity—MCR 6.304

Effective January 1, 2006, MCR 6.304(C)(2) was amended. Near the top of page 390, replace the text in (2) with the following language:

(2) that, by a preponderance of the evidence, the defendant was legally insane at the time of the offense.

4.34 Plea of Guilty but Mentally Ill—MCR 6.303

Replace the second sentence in the first paragraph on page 390 with the following text:

“In addition to establishing a factual basis for the plea pursuant to MCR 6.302(D)(1) or (D)(2)(b), the court must examine the psychiatric reports prepared and hold a hearing that establishes support for a finding that the defendant was mentally ill at the time of the offense to which the plea is entered.” MCR 6.303.*

*As amended,
effective
January 1,
2006.

4.35 Withdrawal of a Guilty Plea

Effective January 1, 2006, MCR 6.311 was eliminated and its provisions were incorporated into MCR 6.310(C) and (D). On page 391, before subsection (A), delete the reference to MCR 6.311.

A. Withdrawal of Plea Before Sentencing

Replace all but the first paragraph on page 391 with the following:

A defendant has the right to withdraw a guilty plea before the court accepts the plea on the record. MCR 6.310(A).

MCR 6.310(B) sets forth the requirements for withdrawing a plea after the court accepts it but before the court imposes sentence.* MCR 6.310(B) states:

“After acceptance but before sentence,

*As amended,
effective
January 1,
2006.

“(1) a plea may be withdrawn on the defendant’s motion or with the defendant’s consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant’s motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by [MCR 6.310](C).

“(2) the defendant is entitled to withdraw the plea if

“(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

“(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.” MCR 6.310(B)(1)–(2), as amended.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

C. Withdrawal of Plea After Sentencing

Effective January 1, 2006, MCR 6.311 was deleted and its provisions were incorporated into MCR 6.310. On page 393, delete the asterisk and corresponding side note regarding these amendments and replace the first three paragraphs with the following text:

MCR 6.310(C) sets forth the requirements for withdrawing a plea after sentence is imposed:

“The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.”

The issue preservation requirements formerly found in MCR 6.311(C) are now located in MCR 6.310(D). On page 393, in the introduction to the quoted text of subrule MCR 6.311(C), change the reference from MCR 6.311(C) to MCR 6.310(D).

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.35 Withdrawal of a Guilty Plea

G. Appealing a Guilty Plea

Add the following text to the August 2005 update to pages 394–395:

Effective January 1, 2006, MCR 6.425(F)(2)(b) and (G)(1)(c) were further amended “to more accurately reflect the holding of the United States Supreme Court in *Halbert v Michigan*[.]”

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.36 Sentence Bargaining

B. Violations of a Sentence Agreement or Recommendation

2. By Defendant

Effective January 1, 2006, MCR 6.310(C) was relettered (E) and amended. As amended, the subrule permits a prosecutor to move that a defendant's plea be vacated before *or after* sentence has been imposed if the defendant has failed to comply with the terms of a plea agreement.

Replace the first paragraph on page 397 with the following text:

MCR 6.310(E) states that “[o]n the prosecutor’s motion, the court may vacate a plea if the defendant has failed to comply with the terms of a plea agreement.”

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.36 Sentence Bargaining

C. Enforcing a Sentence Agreement

Insert the following text after the first paragraph on page 399:

A defendant is entitled to withdraw his or her plea when the court is unable to comply with the prosecutor's sentence recommendation or agreement, or the court is unable to sentence a defendant in accord with the court's initial statement regarding the sentence it would impose. MCR 6.310(B)(2)(a)–(b).*

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part IV—Pleas (MCR Subchapter 6.300)

4.37 Plea—Collateral Attack of Earlier Plea or Conviction

C. Uncontested Prior Convictions

Insert the following text after the first paragraph on page 401:

MCR 6.610(F)(2) incorporates the standard espoused by the *Garvie* and *Schneider* Courts in the above paragraph. MCR 6.610(F)(2) states:*

“Unless a defendant who is entitled to appointed counsel is represented by an attorney or has waived the right to any attorney, a subsequent charge or sentence may not be enhanced because of this [prior] conviction and the defendant may not be incarcerated for violating probation or any other condition imposed in connection with this [prior] conviction.”

*Effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

On page 405, replace the second sentence of the second full paragraph with the following information:

MCR 2.511(G) states as follows regarding replacement of jurors removed during voir dire:

“(G) Replacement of Challenged Jurors. After the jurors have been seated in the jurors’ box and a challenge for cause is sustained or a peremptory challenge or challenges exercised, another juror or other jurors must be selected and examined. Such jurors are subject to challenge as are previously seated jurors.”*

*Effective
January 1,
2006.

MCR 2.511(F) prohibits discrimination in the jury selection process.*
According to MCR 2.511(F):

*Effective
January 1,
2006.

“(1) No person shall be subjected to discrimination during voir dire on the basis of race, color, religion, national origin, or sex.

“(2) Discrimination during voir dire on the basis of race, color, religion, national origin, or sex for the purpose of achieving what the court believes to be a balanced, proportionate, or representative jury in terms of these characteristics shall not constitute an excuse or justification for a violation of this subsection.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

C. Voir Dire

1. Challenges for Cause

Effective January 1, 2006, MCR 2.511(D)(2) was deleted. Delete the reference to that rule in the second full paragraph on page 406.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.38 Jury Trial

H. View

Effective January 1, 2006, MCR 6.414 was amended and some of its provisions were reordered. On page 408, immediately following subsection (H), change the reference from MCR 6.414(D) to MCR 6.414(F). In the text following subsection (H), replace the second and third sentences at the bottom of page 408 and the first and second sentences at the top of page 409 with the following text:

MCR 6.414(F) sets forth the method by which the trial court may properly order a jury view:

“(F) View. The court may order a jury view of property or of a place where a material event occurred. The parties are entitled to be present at the jury view. During the view, no persons other than, as permitted by the trial judge, the officer in charge of the jurors, or any person appointed by the court to direct the jurors’ attention to a particular place or site, and the trial judge, may speak to the jury concerning a subject connected with the trial; any such communication must be recorded in some fashion.”

4.39 Jury Waiver

A. Requirements

Effective January 1, 2006, MCR 6.402(A) was amended to conform with MCR 6.113(E), a new subrule that provides a process by which circuit courts may eliminate arraignments. Near the bottom of page 409, replace the second sentence with the following language:

Before accepting a defendant’s waiver, the defendant must have been arraigned on the information (or have waived arraignment), properly advised of the right to a jury trial, and offered the opportunity to consult with an attorney. MCR 6.402(A). In a court where arraignments have been eliminated under MCR 6.113(E), the court may not accept a defendant’s waiver of trial

by jury until the defendant has been provided with a copy of the information and offered an opportunity to consult with an attorney. MCR 6.402(A).

Note: Effective January 1, 2006, MCR 6.113(E) authorizes a circuit court to eliminate arraignments under specific circumstances. MCR 6.113(E) states: “A circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

A. Defendant's Right of Confrontation

4. Unavailable Witnesses

Insert the following text after the July 2005 update to page 415:

See also *People v Bauder*, ___ Mich App ___, ___ (2005) (where the Court of Appeals held that the victim's statements to friends, co-workers, and the defendant's relatives in the weeks before her death were not testimonial statements and their admission did not violate the defendant's right of confrontation).

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.41 Confrontation

B. Special Arrangements to Accommodate Compelling Interests

Effective January 1, 2006, the Michigan Supreme Court adopted a new court rule, MCR 6.006, that addresses the use of video and audio technology in specific court proceedings. Replace the first full paragraph near the top of page 416 with the following text:

MCR 6.006 governs the use of video and audio technology in the conduct of specific court proceedings. In its entirety, MCR 6.006 states:

“(A) Defendant in the Courtroom or at a Separate Location. District and circuit courts may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, arraignments on the information, pretrial conferences, pleas, sentencings for misdemeanor offenses, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations.

“(B) Defendant in the Courtroom—Preliminary Examinations. As long as the defendant is either present in the courtroom or has waived the right to be present, on motion of either party, district courts may use telephonic, voice, or video conferencing, including two-way interactive video technology, to take testimony from an expert witness or, upon a showing of good cause, any person at another location in a preliminary examination.

“(C) Defendant in the Courtroom—Other Proceedings. As long as the defendant is either present in the courtroom or has waived the right to be present, upon a showing of good cause, district and circuit courts may use two-way interactive video technology to take testimony from a person at another location in the following proceedings:

“(1) evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and

proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status;

“(2) with the consent of the parties, trials. A party who does not consent to the use of two-way interactive video technology to take testimony from a person at trial shall not be required to articulate any reason for not consenting.

“(D) Mechanics of Use. The use of telephonic, voice, video conferencing, or two-way interactive video technology, must be in accordance with any requirements and guidelines established by the State Court Administrative Office, and all proceedings at which such technology is used must be recorded verbatim by the court.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.45 Stipulations, Statements, and Arguments

B. Opening Statement

Effective January 1, 2006, MCR 6.414 was amended and some of its provisions were relettered. At the very bottom of page 421, change the court rule cited from MCR 6.414(B) to MCR 6.414(C). At the top of page 422, replace the quoted text with the following text:

“(C) Opening Statements. Unless the parties and the court agree otherwise, the prosecutor, before presenting evidence, must make a full and fair statement of the prosecutor’s case and the facts the prosecutor intends to prove. Immediately thereafter, or immediately before presenting evidence, the defendant may make a like statement. The court may impose reasonable time limits on the opening statements.” MCR 6.414(C).

C. Closing Argument

At the top of page 423, replace the text appearing before sub-subsection (1) with the following text:

MCR 6.414(G) provides:*

“(G) Closing Arguments. After the close of all the evidence, the parties may make closing arguments. The prosecutor is entitled to make the first closing argument. If the defendant makes an argument, the prosecutor may offer a rebuttal limited to the issues raised in the defendant’s argument. The court may impose reasonable time limits on the closing arguments.”

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.47 Directed Verdict

C. Motion for Involuntary Dismissal in Bench Trial

Effective January 1, 2006, MCR 6.419 was amended and a provision addressing bench trials was adopted. Delete the last two lines at the bottom of page 430, and at the top of page 431, replace the quoted text with the following language:

“(C) Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution’s case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.” MCR 6.419(C).

4.48 Jury Instructions

A. Generally

Effective January 1, 2006, MCR 6.414 was amended to include a provision that requires a trial court, before beginning a trial, to deliver to the jury appropriate pretrial instructions. Before the first paragraph near the bottom of page 431, insert the following text:

MCR 6.414(A) requires a trial court to deliver pretrial instructions to the jury. Specifically, the rule states: “Before trial begins, the court should give the jury appropriate pretrial instructions.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.48 Jury Instructions

B. Content of Instructions

On page 432, change all references in the first paragraph from MCR 6.414(F) to MCR 6.414(H) and replace the last sentence in the first paragraph with the following text:

The court must instruct the jury after the parties have completed (or waived) closing arguments. MCR 6.414(H). “[A]t the discretion of the court, and on notice to the parties, the court may instruct the jury before the parties make closing arguments, and give any appropriate further instructions after argument.” MCR 6.414(H).*

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

A. Materials in Jury Room

Insert the following text after the paragraph on page 435:

The court has discretion in determining whether to permit jurors to take with them into the jury room any notes taken during trial. MCR 6.414(D) provides in part:*

“The court may, but need not, allow jurors to take their notes into deliberations. If the court decides not to permit the jurors to take their notes into deliberations, the court must so inform the jurors at the same time it permits the note taking. The court shall ensure that all juror notes are collected and destroyed when the trial is concluded.”

*As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.49 Jury Deliberation

C. Hung Jury

Insert the following after the bulleted list on page 436:

Effective January 1, 2006, MCR 6.420(C) authorizes the court to accept a unanimous jury verdict on any of the counts charged against a defendant, even though the jury cannot reach a unanimous verdict on all counts. Specifically, MCR 6.420(C) states:

“(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury’s verdict on that count or counts.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.50 Jury Questions

B. Questions During Trial

Effective January 1, 2006, MCR 6.414 was amended and a subrule addressing juror questions was added. Insert the following text after the paragraph on page 438:

MCR 6.414(E) formalizes the result reached by the Court in *People v Heard*, discussed above:

“(E) Juror Questions. The court may, in its discretion, permit the jurors to ask questions of witnesses. If the court permits jurors to ask questions, it must employ a procedure that ensures that inappropriate questions are not asked, and that the parties have the opportunity to object to the questions.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.51 Verdict

F. Multiple Charges—Verdict on One or More Counts But Not All

Effective January 1, 2006, MCR 6.420(C) authorizes the court to accept a unanimous jury verdict on any of the counts charged against a defendant, even though the jury cannot reach a unanimous verdict on all counts. On page 441, before Section 4.52, insert the new subsection (F) as indicated above and add the following text:

Where a defendant is charged with multiple counts and the jury reaches a unanimous verdict on any of the counts, the court may accept the jury's verdict with regard to that count or those counts, even if the jury is unable to reach a unanimous verdict on all counts charged against the defendant. Specifically, MCR 6.420(C) states:

“(C) Several Counts. If a defendant is charged with two or more counts, and the court determines that the jury is deadlocked so that a mistrial must be declared, the court may inquire of the jury whether it has reached a unanimous verdict on any of the counts charged, and, if so, may accept the jury's verdict on that count or counts.”

CHAPTER 4

Criminal Proceedings

Part V—Trials and Post-Trial Proceedings (MCR Subchapter 6.400)

4.53 New Trial

A. Generally

Replace the first sentence in the paragraph on page 444 with the following:

“A motion for a new trial may be filed before the filing of a timely claim of appeal.” MCR 6.431(A)(1).^{*} “If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within 6 months of entry of the judgment of conviction and sentence.” MCR 6.431(A)(3), as amended.

^{*}As amended,
effective
January 1,
2006.

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.54 Sentencing—Felony

E. Resentencing

Insert the following language after the paragraph on page 454:

Either party may file a motion to correct an invalid sentence. MCR 6.429(A).^{*} See MCR 6.429(B)(1)–(4), as amended, for the time requirement for filing such a motion.

^{*}As amended,
effective
January 1,
2006.

F. Appeal Rights

Effective January 1, 2006, MCR 6.425(F)(2)(b) and (G)(1)(c) were further amended “to more accurately reflect the holding of the United States Supreme Court in *Halbert v Michigan*[.]” Replace the content of the August 2005 update to page 455 with the following text:

Immediately after imposing sentence on a defendant convicted by plea, the court must advise the defendant that if he or she is financially unable to retain an attorney, the court will appoint an attorney to represent the defendant on appeal. MCR 6.425(F)(2)(b).

When an indigent defendant requests an attorney within 42 days after he or she was sentenced on a conviction by plea, the court must enter an order appointing an attorney. MCR 6.425(G)(1)(c).

Insert the following text before subsection (G) on page 455:

When the performance of a defendant’s appointed or retained counsel prevents the defendant from timely appealing a judgment, MCR 6.428, a new court rule effective January 1, 2006, provides a defendant with an opportunity to remedy the initial untimely appeal. MCR 6.428 states:

“If the defendant did not appeal within the time allowed by MCR 7.204(A)(2) and demonstrates that the attorney or attorneys

retained or appointed to represent the defendant on direct appeal from the judgment either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right, the trial court shall issue an order restarting the time in which to file an appeal of right."

CHAPTER 4

Criminal Proceedings

Part VI—Sentencing and Post-Sentencing (MCR Subchapters 6.400 and 6.500)

4.55 Sentencing—Habitual Offender

A. Notice Required

Insert the following text after the paragraph at the top of page 457:

The notice of intent to seek enhancement under MCR 6.112(F) must be filed within 21 days after the defendant's arraignment on the information, or if the defendant waives arraignment, within 21 days after the information is filed. MCR 6.112(F).*

*As amended,
effective
January 1,
2006.

APPENDIX

Checklists, Scripts, Forms

- ♦ FELONY PLEA, Script/Checklist

The amendment to MCR 6.302(B), effective January 1, 2006, affects the content of any writing used to advise a defendant of his or her guilty plea rights. Therefore, on the second page of the felony plea checklist in the appendix, move the following paragraph so that it appears immediately before the information in brackets—[Option to above: If the court is using a written waiver form]:

If I accept your plea, any appeal will be by leave of the Court of Appeals. That means there is no automatic right to appeal. Instead, you would have to ask the Court of Appeals to hear your case and it would be up to them whether they would. Do you understand that?